

Hostmann v. Wilbur-Ellis Company, Civ. No. 95-59-FR
Adv. No. 93-3561-dds

In re John W. Stoller, Inc., Case No. 392-37358-dds7

02/28/95	J. Frye reversing DDS	Published
		178 BR 260
		1995 WL 89184

In 1988 Wilbur and Helen Stoller sold property known as the Home Place to Debtor by land sale contract, retaining a life estate for themselves in the house and one acre surrounding the house. In 1989, Wilbur and Helen Stoller then transferred their vendor's interest in the property, excluding their life estate, to John and Joann Stoller by warranty deed. On the same date, John and Joann Stoller executed a Line of Credit Mortgage in favor of Household Finance ("HFC") to secure a debt of \$650,000. The property described as collateral in the mortgage included the Home Place, but included no reference to the land sale contract. In 1991 John and Joann Stoller executed a second line of credit mortgage in favor of HFC to secure a debt of \$690,000; the 1991 mortgage included the same property description with respect to the Home Place. In 1992, Debtor and John and Joann Stoller executed a trust deed and UCC financing statement in favor of Wilbur-Ellis to secure repayment of \$1 million. The collateral included the Home Place as well as all accounts, contract rights and other rights to payment of money. All transactions were promptly recorded.

The bankruptcy court relied upon the case of Bedortha v. Sunridge Land Co., Inc., 312 Or. 307, 822 P.2d 694 (1991) in finding that HFC's interest in the payments under the land sale contract were superior to Wilbur-Ellis. Bedortha had held the right to receive contract payments under a land sale contract is part of the vendor's real property interest.

Judge Frye reversed, concluding that nothing in the Bedortha case or in the amendments to ORS 93-640 and 79.1040(10) alters the general rule that a mortgage given on real property which is subject to a land sale contract does not constitute a lien on the interest of a holder of a land sale contract without the land sale contract being referred to in the security instruments. Although ORS 93.640 and 79.1040(10) allow a land sale contract to be recorded in real property records, these statutes do not alter the steps required to be taken in order to create a consensual lien. The Bedortha case applies only to judgment liens, not consensual

liens. Wilbur-Ellis is entitled to judgment.

P94-19A(18)

FILED

05 FEB 28 AM 9:41

U.S. DISTRICT COURT
DISTRICT OF OREGON
PORTLAND, OREGON

CLERK, U.S. BANKRUPTCY COURT
DISTRICT OF OREGON

FEB 28 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In re

JOHN W. STOLLER, INC.,
Debtor.

EDWARD C. HOSTMANN, Trustee,
Plaintiff,

v.

WILBUR-ELLIS COMPANY, a
California corporation;
HOUSEHOLD FINANCE CORPORATION
II, a Delaware corporation;
CUDDY FARMS, INC., an Oregon
corporation; JOHN W. STOLLER
and JOANN M. STOLLER, husband
and wife; WILBUR A. STOLLER
and HELEN L. STOLLER, husband
and wife,

Defendants.

Case No. 392-37358-dds7

Adversary Proceeding
No. 93-3561

Civil No. 95-59-FR

O P I N I O N

Annette T. Kolodzie
Gary L. Blacklidge
David A. Foraker
Greene & Markley, P.C.
1515 S. W. Fifth Avenue, Suite 600
Portland, Oregon 97201

Attorneys for Defendant Wilbur-Ellis Company

PAGE 1 - OPINION

86 (87)

1 James Ray Streinz
2 McEwen, Gisvold, Rankin, Carter & Streinz
3 1600 Standard Plaza
4 1100 S. W. Sixth Avenue
5 Portland, Oregon 97204

6 Attorneys for Defendant
7 Household Finance Corporation II

8 FRYE, Judge:

9 In the matter before the court, defendant Wilbur-Ellis
10 Company appeals from the final judgment of the bankruptcy
11 court entered on September 22, 1994.

12 The undisputed facts are set forth in the opinion of the
13 Honorable Donal D. Sullivan, United States Bankruptcy Judge
14 for the District of Oregon, filed on September 22, 1994. The
15 undisputed facts are as follows:

16 Wilbur and Helen Stoller sold the property [known as
17 the Home Place] to John Stoller Inc. for \$400,000 by
18 a land sale contract dated October 27, 1988. Wilbur
19 and Helen retained a life estate for themselves in
20 the house and one acre of land surrounding the
21 house. A memorandum of the contract was recorded on
22 December 9, 1988. Wilbur and Helen Stoller trans-
23 ferred the property to their son John, and his wife
24 Joann Stoller by warranty deed dated May 17, 1989.
25 The warranty deed conveyed Wilbur and Helen's inter-
26 est free from encumbrances except for their life
estate.

The parties have agreed through their pleadings
that the effect of the warranty deed was to convey
the vendor's interest in the land sale contract from
Wilbur and Helen to John and Joann. The complaint
and answers on file indicate that the warranty deed
effected the transfer by virtue of ORS 93.850, even
though the deposition testimony of John and Joann
Stoller shows that they did not intend or expect to
receive an interest in the contract as a result of
the warranty deed.

Also on May 17, 1989, John and Joann Stoller

1 executed a trust deed entitled Line of Credit Mort-
2 gage (mortgage) in favor of HFC [Household Finance
3 Corporation II] to secure the amount of \$650,000.
4 The property described as collateral included the
5 Home Place. There was no specific reference to the
6 land sale contract in the mortgage. The warranty
7 deed which conveyed the property and land sale con-
8 tract to John and Joann from Wilbur and Helen was
9 recorded in Yamhill County on May 23, 1989 as Docu-
10 ment 04185. Immediately thereafter, the Mortgage
11 executed by John and Joann in favor of HFC was
12 recorded as Document 04186.

13 The transcripts of John and Joann's deposi-
14 tions indicate that they did not know they had any
15 interest in the proceeds of the land sale contract,
16 so they did not have any intention to transfer the
17 contract proceeds as collateral to HFC. It appears
18 however, that they did intend to transfer whatever
19 they received from Wilbur and Helen by virtue of the
20 warranty deed. John and Joann testified that they
21 thought that the payments on the land sale contract
22 would be paid to Wilbur and Helen. However, they
23 also stated that they understood that the warranty
24 deed and the mortgage would place HFC in first
25 position against the property ahead of Wilbur and
26 Helen Stoller. At the time the deeds were executed,
there was little concern about whether HFC or Wilbur
and Helen would be first because the Stollers all
believed the property was worth enough to pay both
obligations in full.

17 John and Joann executed another line of credit
18 mortgage in favor of HFC on April 12, 1991. The
19 mortgage was to secure a note in the amount of
20 \$690,000 and contained the legal descriptions for
21 most of the property included in the 1989 mortgage.
22 The second HFC mortgage was recorded on April 16,
23 1991.

21 In 1992, the debtor, and John and Joann Stoller
22 executed a trust deed and UCC-1a financing statement
23 in favor of Wilbur-Ellis [Wilbur-Ellis Company] to
24 secure repayment of \$1 million. The collateral
25 included the part of the Home Place involved here
26 as well as all accounts, contract rights and other
rights to the payment of money. John and Joann's
depositions indicate that they did not intend to
grant Wilbur-Ellis an interest in the land sale con-
tract because they did not think it was theirs to
encumber.

1 John Stoller Inc. filed chapter 11 on November
2 10, 1992. The case was converted to chapter 7 on
3 April 19, 1993. Wilbur-Ellis sued John and Joann
4 Stoller and obtained judgments against them in the
5 amounts of \$937,375.92 and \$51,576.57. The judg-
6 ments were entered on February 9, 1993 and March 10,
7 1993, respectively. Wilbur-Ellis obtained relief
8 from the stay to garnish the proceeds of the land
9 sale contract owed by Stoller, Inc. John and Joann
10 Stoller filed chapter 7 on December 27, 1993, and
11 the trustee for their estate has not filed anything
12 to indicate his position on these motions.

13 Memorandum, pp. 2-5.

14 The Chapter 7 trustee for the estate of defendants John
15 and Joann Stoller sold the Home Place property for \$1,000,000.
16 Defendants Household Finance Corporation II (HFC) and Wilbur-
17 Ellis Company (Wilbur-Ellis) filed cross-motions for summary
18 judgment in the bankruptcy proceeding seeking a determination
19 as to which party is entitled to the balance of the proceeds
20 from the Land Sale Contract after defendant Cuddy Farms, Inc.,
21 the agreed-upon first interest holder, was paid. The bank-
22 ruptcy court granted summary judgment in favor of HFC and
23 against Wilbur-Ellis. The court explained:

24 Creditors and courts in Oregon have struggled
25 with the proper characterization of a land sale con-
26 tract over the years. While the stream of payments
under the contract itself has been considered per-
sonal property, it is secured by and transfers an
interest in real property. In the last decade, the
Oregon legislature has amended the real property
recording statutes and Oregon's Commercial Code to
remove land sale contracts from Article 9, and to
allow the recording of an interest in a land sale
contract in the real property records. ORS 93.640
and 79.1040(10). The statutes do not explicitly
state whether an interest in a land sale contract
is real property or personal property, but notice
of the interest is provided by filing in the real
property records.

1 The somewhat conflicting case law concerning
2 the nature of a vendor's interest in a land sale
3 contract was reviewed and analyzed in the case of
4 Bedortha v. Sunridge Land Co., Inc., 312 Or. 307,
5 822 P.2d 694 (1991). The Oregon Supreme Court
6 defined the issue before it in Bedortha as:

7 . . . whether a vendor's right to receive
8 payments under an executory land sale
9 contract is a separate personal property
10 interest of the vendor or whether that
11 interest is part of the vendor's real
12 property interest and, therefore subject
13 to a judgment lien.

14 The court affirmed the Court of Appeals in
15 holding that "the right to receive contract payments
16 - unless properly severed - is part of the vendor's
17 real property interest."

18 Although the creditor in Bedortha was a judg-
19 ment lien creditor rather than a consensual secured
20 creditor, the analysis applied by the Oregon Supreme
21 Court is equally applicable to the transaction
22 between the Stollers and HFC. The transfer of the
23 vendor's interest in the contract from Wilbur and
24 Helen to John and Joann was simultaneous with the
25 transfer from John and Joann to HFC to secure the
26 loan. The vendor's right to receive the contract
 payments and the title to the property itself were
 transferred to John and Joann in a single package
 subject only to the vendee's interest of Stoller,
 Inc. and the life estate of Wilbur and Helen. There
 is no evidence to indicate that John and Joann took
 any action to sever the interests once they were
 transferred together through the warranty deed.
 Whatever it was that John and Joann received as
 a result of the warranty deed, they immediately
 transferred to HFC as collateral for the loan in
 1989.

 The recent unpublished opinion in In re Gold
 Key Properties, Inc., BAP No. OR-93-1635-AsMeO,
 slip op. (Bankr. 9th Cir. Feb. 4, 1994) was apply-
 ing Oregon law before it was amended in 1989, and
 therefore, it is not decisive in this matter.

CONCLUSION

 Although it would have been prudent for HFC to
 have specifically described the land sale contract

1 in the mortgage, the documents and timing of the
2 recording of the deed and mortgage were adequate to
3 allow HFC to prevail as first lien holder (after
Cuddy's interest) to the proceeds of the land sale
contract.

4 STANDARD OF REVIEW

5 A bankruptcy court's conclusions of law are reviewed de
6 novo. In re Weisman, 5 F.3d 417, 419 (9th Cir. 1993).

7 ISSUE PRESENTED

8 The issues presented in this appeal are (1) whether the
9 bankruptcy court erred in holding that HFC had a valid, per-
10 fected security interest in the interest of the vendors of
11 the real property, Wilbur A. Stoller and Helen L. Stoller,
12 under the Land Sale Contract dated October 27, 1988 between
13 Wilbur A. Stoller and Helen L. Stoller and the debtor, John
14 W. Stoller, Inc., covering the Home Place (the Land Sale
15 Contract); and, if so, (2) whether the interest of HFC in
16 the interest of the vendors, Wilbur A. Stoller and Helen L.
17 Stoller, in the proceeds due under the Land Sale Contract
18 is prior to the interest of Wilbur-Ellis in such proceeds.

19 CONTENTIONS OF THE PARTIES

20 Wilbur-Ellis contends that the standard deed of trust
21 used by the debtor, John W. Stoller, Inc., to convey to HFC
22 a security interest in the property did not describe the
23 Land Sale Contract as collateral and, therefore, the deed of
24 trust did not create a right to the proceeds from the Land
25 Sale Contract. Wilbur-Ellis contends that the deed of trust
26 ///

1 created a lien on the proceeds from the Land Sale Contract,
2 and that it is entitled to judgment in its favor.

3 HFC contends that the bankruptcy court correctly conclu-
4 ded that the deed of trust executed by John and Joann Stoller
5 in favor of HFC created a security interest in favor of HFC in
6 the real property know as the Home Place, including a security
7 interest in the proceeds from the Land Sale Contract.

8 ANALYSIS

9 The system of recording consensual liens is established
10 under O.R.S. 93.640(1), which states, in part:

11 Every conveyance, deed, land sale contract,
12 assignment of all or any portion of a seller's or
13 purchaser's interest in a land sale contract or
14 other agreement or memorandum thereof affecting the
15 title of real property within this state which is
16 not recorded as provided by law is void as against
17 any subsequent purchaser in good faith and for a
18 valuable consideration of the same real property, or
19 any portion thereof, whose conveyance, deed, land
20 sale contract, assignment of all or any portion of
21 a seller's or purchaser's interest in a land sale
22 contract or other agreement or memorandum thereof
23 is first filed for record, and as against the heirs
24 and assigns of such subsequent purchaser.

19 O.R.S. 93.643(1) provides, in part: "To give constructive
20 notice of an interest in real property, a person must have
21 documentation of the interest recorded in the indices main-
22 tained under ORS 205.130 in the county where the property is
23 located."

24 The "Line of Credit Mortgage" executed by the borrowers,
25 John and Joann Stoller, and the lender, HFC, states, in part,
26 ///

1 that the "[b]orrower is indebted to Lender in the principal
2 sum of \$650,000.00," and that in order:

3 TO SECURE to Lender the repayment of the
4 indebtedness . . . Borrower in consideration of the
5 indebtedness herein recited and the trust herein
6 created, irrevocably grants and conveys to Trustee,
in trust, with power of sale, the following des-
cribed property located in the County of Yamhill,
State of Oregon.

7 See attached.

8 TOGETHER with all the improvements now or here-
9 after erected on the property, and all easements,
rights, appurtenances and rents . . . all of which
10 shall be deemed to be and remain a part of the
property covered by this Deed of Trust

11 Exhibit 2 to Affidavit of Gary L. Blacklidge, p. 1. The
12 attachment to the Line of Credit Mortgage contains a legal
13 description of the property known as the Home Place.

14 There is no reference in the Line of Credit Mortgage to
15 the Land Sale Contract or to the disposition of the proceeds
16 from the Land Sale Contract. There are no terms in the Line
17 of Credit Mortgage which directly or indirectly refer to the
18 proceeds from the Land Sale Contract.

19 While HFC argues that the reference to the word "rights"
20 contained in the last paragraph above "broadens the reach of
21 the lien of the Trust Deed" (Appellee's Brief, p. 10), this
22 court finds that the word "rights" unambiguously refers to
23 the real property rights that arise from an interest in real
24 property and does not refer to the contractual rights that
25 someone may have to the property. This is particularly true
26 in this case where the facts are clear that John and Joann

1 Stoller did not know that they had any contractual rights to
2 the proceeds from the Land Sales Contract, and they neces-
3 sarily had no intent to transfer any right that they had to
4 those proceeds at the time that the Line of Credit Mortgage
5 was executed.

6 A vendor's interest in a land sale contract and the
7 vendor's interest in the land itself are separate interests.
8 Security Bank v. Chiapuzio, 304 Or. 438, 444, 747 P.2d 335
9 (1987). In Bullock v. Roost, 119 B.R. 787 (Bankr. D. Or.
10 1990), the court explained:

11 The Oregon Supreme Court held that, under Oregon
12 law, a vendor of an executory land sale contract
13 possesses two distinct, divisible and separable
14 interests. The first is the vendor's interest in
15 the real property subject to the land sale contract.
16 The second is the vendor's interest in the contract
17 itself (that is, the right to receive the payments
18 made and to be made on the contract).

19 Id. at 790, discussing Security Bank v. Chiapuzio, 304 Or. at
20 443-44.

21 In order for HFC to prevail, this court would have to
22 conclude that the terms of the trust deed executed by John and
23 Joann Stoller in favor of HFC created a lien on the interest
24 of John and Joann Stoller to the payments made on the Land
25 Sale Contract, as well as a lien on the property itself, where
26 only the interest in the land itself is referred to in the
security instruments. HFC argues, and the bankruptcy court
agreed, that the interest of the vendor in a land sale con-
tract is a real property interest which is conveyed whenever
///

1 the interest of the vendor in the land itself is conveyed to
2 a consensual secured creditor.

3 The position taken by HFC, that the interest of the vendor
4 in a land sales contract is encumbered whenever an interest in
5 the land is created, does apply to a judgment lien creditor by
6 operation of law. O.R.S. 18.350; May v. Emerson, 52 Or. 262,
7 96 P. 454, 96 P. 1065 (1908); Bedortha v. Sunridge Land Co.,
8 312 Or. 307, 822 P.2d 694 (1991).

9 However, this same rule has not been applied to the claim
10 of a consensual lien creditor who is required to specifically
11 describe the property to be encumbered in the security instru-
12 ments. A vendor who mortgages its interest in land that is
13 subject to a land sale contract does not grant a security
14 interest in the vendor's interest in the land sale contract.
15 See, e.g., Pedersen v. Barkhurst, 139 Or. 483, 10 P.2d 347
16 (1932); Lathrop v. Lewis, 247 Or. 560, 431 P.2d 268 (1967);
17 and Security Bank v. Chiapuzio, supra.

18 This court concludes that nothing in the Bedortha case or
19 in the amendments to O.R.S. 93.640 and 79.1040(10) alters the
20 general rule that a mortgage given on real property which is
21 subject to a land sale contract does not constitute a lien on
22 the interest of a holder of a land sale contract without the
23 land sale contract being referred to in the security instru-
24 ments. O.R.S. 93.640 and 79.1040(10) allow a land sale con-
25 tract to be recorded in real property records, but these
26 ///

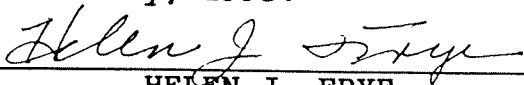
1 statutes do not alter the steps required to be taken in order
2 to create a consensual lien.

3 The Bedortha case applies to judgment liens. Bedortha
4 does not apply to consensual liens. Consensual liens, such
5 as liens that attach from mortgages and trust deeds, are liens
6 that attach by virtue of contract. Call v. Jeremiah, 246 Or.
7 568, 425 P.2d 502 (1967). A consensual lien is created by
8 the contracts of the parties. A consensual lien in property
9 is referenced in security instruments. Whether the Land Sale
10 Contract at issue here created a real property interest or a
11 personal property interest, the contractual rights of the par-
12 ties are separate from the property interests of the parties.
13 In order to create a consensual lien, the contract rights must
14 be specified in the security instruments.

15 CONCLUSION

16 HFC does not have a valid, perfected security interest
17 in the interest of the vendors under the Land Sale Contract
18 dated October 27, 1988 between Wilbur A. Stoller and Helen L.
19 Stoller and the debtor, John W. Stoller, Inc., covering the
20 Home Place. Wilbur-Ellis has an interest in the proceeds from
21 the Land Sale Contract by virtue of its judgment lien. The
22 court reverses the judgment of the bankruptcy court in favor
23 of HFC and will enter judgment in favor of Wilbur-Ellis.

24 DATED this 28 day of February, 1995.

25 
26 HELEN J. FRYE
United States District Judge

U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
FILED

JUN 21 1994

TERENCE H. DUNN, CLERK
BY DEPUTY

mem

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
JOHN W. STOLLER, INC.,) 392-37358-dds7
Debtor,) Adversary Proceeding No.
EDWARD C. HOSTMANN, Trustee,) 93-3561-dds
Plaintiff,) MEMORANDUM GRANTING PARTIAL
v.) SUMMARY JUDGMENT TO HOUSEHOLD
WILBUR-ELLIS COMPANY, a) FINANCE CORPORATION
California corporation,)
HOUSEHOLD FINANCE)
CORPORATION II, a Delaware)
corporation, CUDDY FARMS,)
INC., an Oregon corporation,)
JOHN W. STOLLER and JOANN M.)
STOLLER, husband and wife,)
WILBUR A. STOLLER and)
HELEN L. STOLLER, husband)
and wife, FARM CREDIT)
SERVICES LEASING CORP., a)
Minnesota corporation,)
BANCORP LEASING AND)
FINANCIAL CORP., an Oregon)
corporation, and OREGON)
TURKEY GROWERS, an Oregon)
cooperative association,)
Defendants.)

PAGE 1 - MEMORANDUM

1 The chapter 7 trustee sold property referred to as
2 the "Home Place" for \$1 million. He filed this complaint to
3 determine the priority among various claimants to the
4 proceeds of the Home Place ("Property") and the Clyde Place.
5 The debtor purchased the Property through a land sale
6 contract with a purchase price of \$400,000. Household
7 Finance Corporation II ("HFC") and Wilbur-Ellis Company
8 ("Wilbur-Ellis") filed cross-motions for summary judgment
9 concerning a portion of the proceeds of the land sale
10 contract.

11 All parties acknowledge that Cuddy Farms, Inc.
12 ("Cuddy") has the first interest in the proceeds pertaining
13 to part of the land, and that issues of fact remain as to the
14 amount of the proceeds to be allocated to that part of the
15 property. The present motions seek a ruling on who is
16 entitled to the balance of the proceeds of the land sale
17 contract after Cuddy has been paid its share. The
18 outstanding balance owing on the contract has not yet been
19 decided, but the parties believe they may be able to resolve
20 that issue after further discovery.

21 On the issue presented by the cross-motions, summary
22 judgment should be granted in favor of HFC for the following
23 reasons.

24 FACTS

25 The basic facts are undisputed. Wilbur and Helen
26 Stoller sold the property to John Stoller Inc. for \$400,000

PAGE 2 - MEMORANDUM

1 by a land sale contract dated October 27, 1988. Wilbur and
2 Helen retained a life estate for themselves in the house and
3 one acre of land surrounding the house. A memorandum of the
4 contract was recorded on December 9, 1988. Wilbur and Helen
5 Stoller transferred the property to their son John, and his
6 wife Joann Stoller by warranty deed dated May 17, 1989. The
7 warranty deed conveyed Wilbur and Helen's interest free from
8 encumbrances except for their life estate.

9 The parties have agreed through their pleadings that
10 the effect of the warranty deed was to convey the vendor's
11 interest in the land sale contract from Wilbur and Helen to
12 John and Joann. The complaint and answers on file indicate
13 that the warranty deed effected the transfer by virtue of
14 ORS 93.850, even though the deposition testimony of John and
15 Joann Stoller shows that they did not intend or expect to
16 receive an interest in the contract as a result of the
17 warranty deed.

18 Also on May 17, 1989, John and Joann Stoller executed
19 a trust deed entitled Line of Credit Mortgage (mortgage) in
20 favor of HFC to secure the amount of \$650,000. The property
21 described as collateral included the Home Place. There was
22 no specific reference to the land sale contract in the
23 mortgage. The warranty deed which conveyed the property and
24 land sale contract to John and Joann from Wilbur and Helen
25 was recorded in Yamhill County on May 23, 1989 as
26 Document 04185. Immediately thereafter, the Mortgage

PAGE 3 - MEMORANDUM

1 executed by John and Joann in favor of HFC was recorded as
2 Document 04186.

3 The transcripts of John and Joann's depositions
4 indicate that they did not know they had any interest in the
5 proceeds of the land sale contract, so they did not have any
6 intention to transfer the contract proceeds as collateral to
7 HFC. It appears however, that they did intend to transfer
8 whatever they received from Wilbur and Helen by virtue of the
9 warranty deed. John and Joann testified that they thought
10 that the payments on the land sale contract would be paid to
11 Wilbur and Helen. However, they also stated that they
12 understood that the warranty deed and the mortgage would
13 place HFC in first position against the property ahead of
14 Wilbur and Helen Stoller. At the time the deeds were
15 executed, there was little concern about whether HFC or
16 Wilbur and Helen would be first because the Stollers all
17 believed the property was worth enough to pay both
18 obligations in full.

19 John and Joann executed another line of credit
20 mortgage in favor of HFC on April 12, 1991. The mortgage was
21 to secure a note in the amount of \$690,000 and contained the
22 legal descriptions for most of the property included in the
23 1989 mortgage. The second HFC mortgage was recorded on April
24 16, 1991.

25 In 1992, the debtor, and John and Joann Stoller
26 executed a trust deed and UCC-1a financing statement in favor

PAGE 4 - MEMORANDUM

1 of Wilbur-Ellis to secure repayment of \$1 million. The
2 collateral included the part of the Home Place involved here
3 as well as all accounts, contract rights and other rights to
4 the payment of money. John and Joann's depositions indicate
5 that they did not intend to grant Wilbur-Ellis an interest in
6 the land sale contract because they did not think it was
7 theirs to encumber.

8 John Stoller Inc. filed chapter 11 on November 10,
9 1992. The case was converted to chapter 7 on April 19, 1993.
10 Wilbur-Ellis sued John and Joann Stoller and obtained
11 judgments against them in the amounts of \$937,375.92 and
12 \$51,576.57. The judgments were entered on February 9, 1993
13 and March 10, 1993, respectively. Wilbur-Ellis obtained
14 relief from the stay to garnish the proceeds of the land sale
15 contract owed by Stoller, Inc. John and Joann Stoller filed
16 chapter 7 on December 27, 1993, and the trustee for their
17 estate has not filed anything to indicate his position on
18 these motions.

19 ANALYSIS

20 Creditors and courts in Oregon have struggled with
21 the proper characterization of a land sale contract over the
22 years. While the stream of payments under the contract
23 itself has been considered personal property, it is secured
24 by and transfers an interest in real property. In the last
25 decade, the Oregon legislature has amended the real property
26 recording statutes and Oregon's Commercial Code to remove

1 land sale contracts from Article 9, and to allow the
2 recording of an interest in a land sale contract in the real
3 property records. ORS 93.640 and 79.1040(10). The statutes
4 do not explicitly state whether an interest in a land sale
5 contract is real property or personal property, but notice of
6 the interest is provided by filing in the real property
7 records.

8 The somewhat conflicting case law concerning the
9 nature of a vendor's interest in a land sale contract was
10 reviewed and analyzed in the case of Bedortha v. Sunridge
11 Land Co., Inc., 312 Or. 307, 822 P.2d 694 (1991). The
12 Oregon Supreme Court defined the issue before it in Bedortha
13 as:

14 . . . whether a vendor's right to receive payments
15 under an executory land sale contract is a separate
16 personal property interest of the vendor or whether
that interest is part of the vendor's real property
interest and, therefore subject to a judgment lien.

17 The court affirmed the Court of Appeals in holding
18 that "the right to receive contract payments - unless
19 properly severed - is a part of the vendor's real property
20 interest."

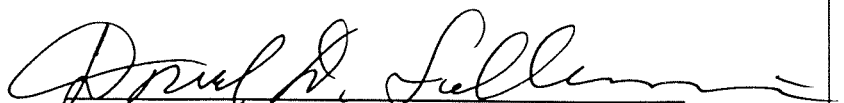
21 Although the creditor in Bedortha was a judgment lien
22 creditor rather than a consensual secured creditor, the
23 analysis applied by the Oregon Supreme Court is equally
24 applicable to the transaction between the Stollers and HFC.
25 The transfer of the vendor's interest in the contract from
26 Wilbur and Helen to John and Joann was simultaneous with the

1 transfer from John and Joann to HFC to secure the loan. The
2 vendor's right to receive the contract payments and the title
3 to the property itself were transferred to John and Joann in
4 a single package subject only to the vendee's interest of
5 Stoller, Inc. and the life estate of Wilbur and Helen. There
6 is no evidence to indicate that John and Joann took any
7 action to sever the interests once they were transferred
8 together through the warranty deed. Whatever it was that
9 John and Joann received as a result of the warranty deed,
10 they immediately transferred to HFC as collateral for the
11 loan in 1989.

12 The recent unpublished opinion in In re Gold Key
13 Properties, Inc., BAP No. OR-93-1635-AsMeO, slip op. (Bankr.
14 9th Cir. Feb. 4, 1994) was applying Oregon law before it was
15 amended in 1989, and therefore, it is not decisive in this
16 matter.

17 CONCLUSION

18 Although it would have been prudent for HFC to have
19 specifically described the land sale contract in the
20 mortgage, the documents and timing of the recording of the
21 deed and mortgage were adequate to allow HFC to prevail as
22 first lien holder (after Cuddy's interest) to the proceeds of
23 the land sale contract.

24 
25 DONAL D. SULLIVAN
26 Bankruptcy Judge

1 cc: Fred M. Granum
2 Annette T. Kolodzie
3 Robert L. Carlton
4 Robert J. Vanden Bos
5 Thomas Churchill
6 U. S. Trustee
7 James Ray Streinz
8 Kent V. Snyder
9 John D. Albert
10 Eric Yandell
11 Mark B. Comstock
12 Kathleen Evans
13 John W. Mitchell
14
15
16
17
18
19
20
21
22
23
24
25
26